

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANFORD R. WHEELER

Claimant

VS.

BOEING COMPANY

Respondent

AND

KEMPER INSURANCE COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 187,565

ORDER

Claimant requested Appeals Board review of Administrative Law Judge John D. Clark's June 22, 1999, Order. The Appeals Board heard oral argument on November 12, 1999, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Richard J. Liby of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Marvin R. Appling of Wichita, Kansas.

RECORD

The record consists of a motion hearing held before the Administrative Law Judge on June 22, 1999, and the claimant attorney's affidavit admitted as an exhibit.

ISSUES

This matter came before the Administrative Law Judge on a motion filed by the claimant's attorney requesting attorney fees for services rendered in the representation of the claimant in regard to an application for review and modification of an award filed by the respondent. Claimant's attorney fee request was for 39.75 hours at the hourly rate of \$125 for a total amount of \$4,968.75. The Administrative Law Judge reduced the attorney's time to 8 hours and reduced the hourly rate to \$75 per hour for a total amount of \$600. Claimant appealed and requested the Appeals Board to review the following issues:

1. Did the Administrative Law Judge err when he reduced the time claimant's attorney spent representing the claimant from 39.75 hours to 8 hours?
2. What is the appropriate attorney fee hourly rate?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was originally awarded an 86 percent permanent partial general disability based on a work disability. But, after claimant was paid 24.5 weeks of temporary total disability compensation and 115.14 weeks of permanent partial disability compensation, respondent returned claimant to work at a comparable wage on October 30, 1996. Following a hearing on respondent's application for review and modification, on January 23, 1997, the Administrative Law Judge entered a Review and Modification Award that reduced claimant's permanent partial general disability benefits to the 10.5 percent permanent functional impairment rating, or 42.58 weeks. The Administrative Law Judge then found that the 42.58 weeks of benefits had been previously paid because claimant had already been paid a total of 115.14 weeks of permanent partial general disability benefits before he returned to work.

Claimant appealed the Administrative Law Judge's Review and Modification Award to the Appeals Board. The claimant contended he was entitled to an additional payment of 30.48 weeks of permanent partial disability benefits after he returned to work. But the Appeals Board affirmed the Administrative Law Judge's Award, and the claimant then timely appealed the Appeals Board's Order to the Kansas Court of Appeals. In a published decision, the Court of Appeals affirmed the Appeals Board's Order.¹

Before the Administrative Law Judge, claimant's attorney submitted an affidavit that included an itemized time sheet that described the services and the time spent representing the claimant in respondent's application for review and modification of the award. The itemized time sheet included time spent from the post-award proceedings before the Administrative Law Judge through the appeal proceeding before the Court of Also, claimant

¹ See Wheeler v. Boeing Co., 25 Kan. App. 2nd, 632, 967 P.2d 1085, (1998) *rev. denied*. _____ Kan. _____ (1999).

made an additional request for 3 hours for the time he spent preparing and arguing the attorney fee issue before the Appeals Board.

The Administrative Law Judge found claimant's attorney was entitled to be compensated for the services he performed in representing the claimant only through the Appeals Board argument at the hourly rate of \$75. Respondent was ordered to pay claimant's attorney fees for 8 hours at \$75 per hour for the total amount of \$600.

On appeal, claimant argues he should be compensated for all the time he was required to perform services for the claimant from the review and modification hearing before the Administrative Law Judge and through the appeal proceedings before the Court of Appeals. Claimant contends there existed a legitimate dispute as to the correct method of computing an award under the 1993 amendments to the workers compensation act when there is a change in a claimant's permanent partial disability rate. Claimant further argues the Court of Appeals also determined there was a significant issue decided in this case by publishing its decision. Therefore, claimant requests the Appeals Board for an award of attorney fees for services rendered in representing the claimant for 42.75 hours at \$125 per hour for a total of \$5,343.75.

Respondent, on the other hand, argues that the award of attorney fees in post-award proceedings is within the discretion of the Administrative Law Judge. K.S.A. 1998 Supp. 44-536(g) provides in part,

If the services rendered herein result in a denial of additional compensation, the director **may** authorize a fee to paid by respondent. (Emphasis added)

The respondent argues the circumstances in this case do not warrant an attorney fee award because the Appeals Board had already established the method of calculating benefits when an injured worker's disability changes under the 1993 amendments.² Respondent requested the Appeals Board to affirm the Administrative Law Judge's June 22, 1999, award of attorney fees in the total amount of \$600.

The Appeals Board has reviewed claimant attorney's time sheet and finds the services described and the time spent for performing those services is reasonable. The Appeals Board also finds the method of computing an award under the 1993 amendments to the workers compensation act when a claimant's disability changes was a significant disputed issue at the time the claimant was appealing the issue to the Court of Appeals. In fact, even at the present time, there remains some confusion in reference to computing an award under the 1993 amendments. Therefore, the Appeals Board concludes, based on the circumstances of this case, there is no reason claimant's attorney should not be compensated for the services performed through the appeal to the Court of Appeals. Additionally, the Appeals Board finds claimant's attorney should also be compensated for

²See Romeo v. Smith Temporary Services, WCAB Docket No. 184,711 (December, 1995).

an additional 3 hours of time spent in preparing and arguing the attorney fee issue before the Appeals Board.

The next issue concerns the reasonableness of the \$75 hourly rate awarded by the Administrative Law Judge. The Administrative Law Judge reduced claimant's hourly rate from the \$125 requested to a rate of \$75 per hour. The Kansas Supreme Court has held that the administrative law judge is an expert when determining what is a reasonable and customary fee.³ The Appeals Board has previously held both rates to be reasonable.⁴ The Appeals Board concludes the hourly rate awarded by the Administrative Law Judge in the amount of \$75 per hour, although at the low end of what is considered reasonable by the Appeals Board, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's Order dated June 22, 1999, should be, and hereby is, modified to award claimant's attorney fees in the amount of \$3,206.25 for 42.75 hours at \$75.00 per hour.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Richard J. Liby, Wichita, KS
Marvin R. Appling, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

³ See City of Wichita v. B G Products, Inc., 252 Kan 367, Syl. ¶2, 845 P.2d 649 (1993).

⁴ See, e.g., Fife v. Boeing Company - Wichita, WCAB Docket No. 162,556 (June 1997).